



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL CASE NO. 21 OF 2018

JAMES OGINGA OCHIEL.....1ST APPELLANT

FANUEL OUMA ACHIEL.....2ND APPELLANT

VERSUS

GEROGE ODHIAMBO ODONGO.....1ST RESPONDENT

MICHAEL OCHOLLA AMINGA.....2ND RESPONDENT

JUDGEMENT

1. This appeal originated from the ruling of the Senior Resident Magistrate Siaya in Siaya R.M. C Miscellaneous case number 14 of 2018 brought by way of Notice of Motion dated 4/5/2018 seeking orders that the title deed issued to the defendants be revoked and the same be issued in his name. Surveyors be allowed to survey and sub divide the parcel in question accordingly. General damages be included in the suit. Costs of this application be provided for.

2. The application was based on grounds that **the litigants in the matter had long died and that the proposed substitutions would allow the real matters in controversy between the parties finally to be determined.** That Parcel No. NORTH SAKWA/MARANDA/1417 was unlawfully registered in the names of BLASIO OCHIENG MUNGU and after his death by transmission in the names of his sons JAMES OGINGA OCHIEL and FANUEL OUMA OCHIEL who sub divided the registration. Unlawful registration was not a matter of debate at the Land Dispute Tribunal and the Defendants never asked to be given their respective shares in the parcel. The plaintiff stood to suffer irreparable harm and prejudice if this application is not allowed. In the supporting affidavit, the respondent herein stated that the matter was originally civil suit no. 187 of 1997 before the honorable court with BLASIO OCHIEL MUNGU as the plaintiff and ODONGO OJWANG and OWOKO MULANG as the defendants. The judgment to the said matter was the adoption of Lands Dispute Tribunal vides case no. SYA/212/97 dated the 15th August, 1997. Parcel no. NORTH SAKWA/MARANDA/1417 was unlawfully registered in the name of BLASIO OCHEING MUNGU and further after his death by transmission in the name of his sons JAMES OGINGA OCHIEL and FANUEL OUMA OCHIEL .

3. In the replying affidavit the 1st Appellant stated that the respondent had no capacity to institute the suit. Moreover, that there was no suit and that ad litem could not confirm intact in land and that the court did not have jurisdiction to overturn a decision of the High Court.

4. The honourable Magistrate relied on a copy of judgement which the Tribunal found that Land Registration number North Sakwa/Maranda/1417 was formally registered in the names of Blasio Ochiel Mungu. The Learned Magistrate observed that the appellants were registered as proprietors of the land through a succession process. However, the Magistrate found that the Appellants were registered through fraud. The application was allowed as prayed. The appellants appealed on grounds namely:

1. The Learned Trial Magistrate erred in law and fact by revoking ownership of a title to land on a matter instituted by way of a miscellaneous application.

2. The Learned Trial Magistrate erred in law and fact by subjecting the decision of a High Court Judge of the Republic of Kenya in a matter instituted by way of a miscellaneous application hence acting as an Appellate Court.

3. The Learned Trial Magistrate erred in law and fact by failing to appreciate that he had no jurisdiction to entertain a matter which had gone through a succession process and to which failure had occasioned a serious miscarriage of justice.

4. The Learned Trial Magistrate erred in law by failing to appreciate that revoking a title to land without a fording parties an opportunity to tender evidence in a hearing is a violation of a constitutional right.

5. The Learned Trial Magistrate erred in law and fact by failing to appreciate the fact that land parcel NO. NORTH SAKWA/MARANDA/1417 had long ceased to exist immediately after the certificate of confirmation of Grant was issued in SIAYA SRMC SUCC. NO. 284 OF 2002 and its perfection thereafter by the Lands Registry Siaya.

5. The appellants pray that the appeal be allowed and the court order dated 9/7/2018 be set aside.

6. I have carefully considered the submissions by Anyul Learned Counsel for the appellants whose grievance is that there was no suit before the Learned Magistrate for revocation of title. Moreover, the trial Honourable Magistrate had no jurisdiction to revoke title and set aside a decision of the High Court in a Succession Process. I do agree with Mr. Anyul that the Learned Magistrate had no powers to deal with the ownership of the suit property which had been determined by the High Court in Succession Case no. 284 of 2002.

7. Ultimately, this court finds that the Honourable Magistrate did not have jurisdiction to determine a matter that had been determined by the High Court in Succession Cause. Moreover, there was no suit before the magistrate court.

8. The interpretation **Section of the Civil Procedure Act Cap 21 Laws of Kenya** define a suit in **Section 2** as all court proceedings commenced in any manner prescribe. There is no provision for filing a suit by way of miscellaneous application. I do find the appeal merited, the same is allowed and the order dated 9/7/2018 is set aside. Costs to the Appellants. Orders accordingly.

DATED AND DELIVERED THIS 28th DAY OF FEBRUARY, 2020.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Mr. Anyul for Appellant

Respondent Absent

I/P present in person.